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AN AUSTRALIAN REPUBLIC - ISSUES AND OPTIONS

This article is a reproduction of the summary report, under the same title, of the Republic Advisory Committee, subject to minor changes in presentation for the Year Book.

BACKGROUND

The question of whether to retain the monarchy or move to a republic is one which has been debated in Australia since before federation in 1901. The widespread interest in the question in recent times has highlighted the need for information about what a move to a republic might involve.

It was for this purpose that the Republic Advisory Committee was established by the Prime Minister, The Honourable P J Keating MP, on 28 April 1993. The Committee was asked to examine the issues and develop:

an options paper which describes the minimum constitutional changes necessary to achieve a viable Federal Republic of Australia, maintaining the effect of our current conventions and principles of government.

The Committee was asked specifically not to make recommendations, but did come to a number of conclusions about matters relevant to consideration of the options.

The Report of the Republic Advisory Committee was published in 1993 by the Australian Government Printer, Canberra. What follows is a summary of the Report taken from An Australian Republic, The Options - An Overview produced by the Committee in the interests of achieving a wide understanding of the issues and options involved if Australia were to become a republic.

What it is about

In looking at the options, the Committee was required by its Terms of Reference to address the following:

- the removal of all references to the monarch in the Constitution;
- the need for an office of an Australian head of state, its creation, and what it might be called;
- how the head of state might be appointed and removed;
- how the powers of a head of state should be made subject to the same conventions and principles as apply to the powers of the Governor-General;

- how the Constitution would need to be changed for Australia to become a republic; and
- the implications for the States.

What it is not about

The other question, i.e. whether Australia should or should not become a republic, is for the community to consider. The Committee has not addressed this question, indeed it was specifically excluded from the Terms of Reference. The Committee's contribution to the broader debate over the republic question is to provide some concrete options for a republic to enable the debate to proceed in an informed way.

In both consultations with the public and written submissions it was apparent to the Committee that many people were concerned about a variety of issues including whether or not there should be a change to the national flag, the powers of the Senate, the role of the States, and Australia's membership of the Commonwealth of Nations, amongst others. These issues are quite separate from the task the Committee was asked to undertake and are in no way affected by the options outlined by the Committee.

The consultation process

At the outset, the Committee prepared and distributed an 'Issues Paper' along with copies of the Australian Constitution. (The Constitution was reproduced in the 1992 Year Book). The Issues Paper provided a background to the issues arising from the Terms of Reference and briefly outlined some of the possible methods of dealing with them. It was designed to serve as a guide to members of the public in preparing submissions to the Committee.

In addition to receiving over 400 written submissions, the Committee conducted public hearings in all capital cities and in major regional centres. The Committee also consulted with a wide range of individuals including Governors, Heads of Government and other leaders of political parties, Ministers, other politicians, Solicitors-General and representatives of trade unions and of organisations representing ethnic communities.

THE COMMITTEE'S TASK

The Terms of Reference require the Committee to produce an 'options paper' describing the minimum constitutional changes necessary to achieve a viable federal republic of Australia, while maintaining the effect of our current conventions and principles of government.

It is in this respect that the Committee's task has been described as 'minimalist'. Australia is already a state in which sovereignty derives from its people, and in which all public offices, except that at the very top of the system, are filled by persons deriving authority, directly or indirectly, from the people. The only element of the Australian system of government which is not consistent with a republican form of government is the monarchy (which is an hereditary office succession to which is governed by the laws of another country).

If the monarchy were to be replaced with a republican head of state, the Constitution would need to be amended in only three substantive ways:

- First, provisions establishing the office of a new Australian head of state would have to be

set out in the Constitution together with a method of appointment and, where necessary, removal.

- Second, a method of dealing with the powers of the head of state, and the existing conventions surrounding the exercise of those powers, would need to be incorporated into the Constitution.

- Third, as the Queen is also head of state of each of the six Australian States, the position of the States would need to be addressed.

The remaining amendments to the Constitution which would be necessary to establish a republic (including removing references to the Queen and the Governor-General) are essentially consequential on those changes.

The Committee was required to describe the 'minimum constitutional changes' necessary to achieve a viable republic, and in doing so, to exclude any which would 'otherwise change our structure of government, including the relationship between the Commonwealth and the States'.

Before summarising the options which the Committee believe satisfy these criteria, it is appropriate to consider briefly the main elements of our existing structure of government.

Our Way of Government

The Commonwealth of Australia is a federal parliamentary democracy. Under the Constitution, the Parliament, consisting of the Queen, the Senate and the House of Representatives, exercises the legislative power of the Commonwealth. The Queen is the head of state and is represented in Australia by the Governor-General, who is appointed by the Queen acting on the advice of the Prime Minister of Australia.

The House of Representatives is currently made up of 147 members each of whom represents a single electorate. The electorates are distributed between the States and mainland territories in accordance with their populations, subject to a constitutional guarantee that each of the existing States is to have at least five seats.

The Senate was designed as a 'States House'. Each State has the same number of Senators (currently twelve) regardless of population, elected on a State-wide basis by a system of proportional representation. The Northern Territory and the Australian Capital Territory have two Senators each, giving the Senate a current total membership of 76.

The powers of the Senate and the House of Representatives in relation to legislation are, in most respects, equal. The Senate cannot, however, initiate laws appropriating revenue of moneys or laws imposing taxation and cannot amend laws imposing taxation or providing money for the ordinary annual services of the Government. If the Senate does not agree with a bill passed by the House of Representatives, then the Prime Minister can, if certain conditions have been fulfilled, advise the Governor-General to dissolve both the Senate and the House of Representatives for an election.

The description of Australia as a federation indicates that the responsibilities of governing the country are divided between the Governments and Parliaments of the six States, the two self-governing Territories and the Commonwealth. The distribution of powers between the Commonwealth and the States is set out in the Constitution and the High Court adjudicates on whether legislation of the Parliaments is consistent with these provisions.

Australia has a system of 'responsible government'. This means that the government of the nation is conducted by a Prime Minister and Ministers, each of whom administers, and is responsible for, a particular department or departments of government. The Government is responsible to the House of Representatives in that it must have the 'confidence' of the House to remain in office. The Prime Minister is the person who leads the political party, or coalition of parties, which has won a majority in the House of Representatives, or who can otherwise command the support of a majority of its members. Generally, as is the case at the present time, the senior members of the Ministry form the Cabinet, which is the principal decision-making body of the Government.

Unlike some other systems of Government, such as in the United States, the head of government, the Prime Minister, is not the same person as the head of state. In this respect, we are similar to many republics such as Germany, Italy, India and Ireland and constitutional monarchies like the United Kingdom. A head of state like that of Australia is often referred to as a 'non-executive head of state' to distinguish the office from an 'executive head of state', such as the American President.

The Constitution and the reality of modern government

One has only to examine the Commonwealth Constitution to see that, read alone, it is a poor guide to the manner in which Australia is actually governed and can give a misleading impression of the actual powers of both the Queen and the Governor-General. The powers conferred on the Queen and the Governor-General are, on a literal reading, very extensive. Of course these constitutional powers are exercised by the Queen and Governor-General (almost invariably) on ministerial advice, but this important element of our system of responsible government is not set out in the Constitution. The 'real' relationship between the Queen and the Governor-General on the one hand, and the elected Government on the other, is governed by unwritten rules - the so-called 'constitutional conventions'.

Moreover, there is no reference in the Constitution to the Prime Minister or the Cabinet, and while it does refer to Ministers of State, they are said to be appointed by, and to hold office 'during the pleasure of', the Governor-General. There is no specific reference to the need for the Prime Minister or Ministers to command the confidence of the House of Representatives.

Section 1 of the Constitution states that the Legislative power of the Commonwealth is vested in a Federal Parliament which consists of 'the Queen, a Senate and a House of Representatives'. Section 2 goes on to provide that the Queen's representative shall be a Governor-General who holds office 'during her pleasure' and that the Governor-General shall have such 'powers and functions as the Queen may be pleased to assign to him'. The executive power of the Commonwealth is 'vested in the Queen' by section 61 although 'exercisable by the Governor-General as the Queen's representative'. Section 68 says that the Governor-General is commander in chief of the armed forces.

Sections 58 and 59 of the Constitution appear to confer extraordinary powers over Australian affairs on the Queen. Section 58 provides that the Governor-General may give, or withhold, assent to bills passed by both Houses of Parliament. It also provides that he may reserve such bills for the Queen's pleasure. If a bill is reserved for the monarch's approval she has two years to decide whether she will approve it. Moreover, under section 59, the monarch has the right to disallow legislation passed by Parliament and assented to by the Governor-General.

These provisions were appropriate in 1901 because Australia was still a dependent part of the British Empire. They were designed to enable the Imperial Government in London to oversee the conduct of Australian affairs and intervene if the Australian Parliament and Government acted in

a way that was unacceptable to the Imperial Government or inconsistent with British interests. They are clearly inappropriate in the Constitution of an independent nation, as Australia now is.

Constitutional conventions

Part of the reason why the Constitution is not an accurate description of the way Australia is governed is that the constitutional conventions which govern the conduct of both the Queen and the Governor-General are not recorded in the Constitution or any other legislative instrument. The conventions, which are unwritten rules not enforceable by the courts, embody many of the essential principles of responsible government. These conventions - for example, that the Government must have the confidence of the popularly elected House of Parliament and that the Queen (and the Governor-General) acts on ministerial advice except in relation to the exercise of the 'reserve' powers - were clearly understood in 1900. The convention debates of the 1890s show that the framers of the Commonwealth Constitution assumed, for example, that the Government of Australia would be administered by Ministers who could command a majority in the House of Representatives. They chose quite deliberately not to set them down in the text of the Constitution itself. The High Court has, however, held that responsible government is implied in the Constitution.

Responsible government in Australia is still carried on in accordance with these constitutional conventions but they are not authoritatively or comprehensively articulated. Many of the conventions are well understood and accepted, but views differ about the content and operation of some, such as the circumstances in which the Governor-General can dismiss the Prime Minister.

The Queen today

Nowadays the only remaining substantive functions the Queen has in respect of Australia are to appoint, and if requested, to remove, the Governor-General. Both functions would only be performed on the advice of the Australian Prime Minister. This was not the case in 1901 when the Governor-General was not merely the local representative of the Queen, but was the representative of the British Government who appointed him to that post.

The Queen does not represent Australia abroad as she does the United Kingdom. When the Queen visits a foreign country, other than as head of the Commonwealth of Nations, she does so as head of state of the United Kingdom only.

The Queen is the head of state of each of the Australian States and the State constitutions all reflect the central role of the Crown as part of the Parliament and Executive of the State. Since 1986, in performing any functions concerning a particular State of Australia, she acts on the advice of the State Premier. Prior to that time she acted on the formal advice of the British Government with respect to State matters, although for the most part the British Government simply relayed the wishes of the relevant State Government.

The Governor-General today

The Governor-General ceased to be a representative of the United Kingdom Government (and to be appointed on the advice of that Government) following Imperial Conferences in 1926 and 1930, and now represents only the Queen in her capacity as head of state of Australia. The Governor-General is a viceroy (or deputy head of state) and fulfills a largely symbolic or ceremonial role.

The Governor-General's functions are of three kinds:

- those arising under the Constitution (such as the issuing of writs for an election or appointment of federal judges), or under Commonwealth legislation (such as making regulations or proclamations), in relation to which the Governor-General acts on ministerial advice;
- the so-called 'reserve powers' (rarely exercised constitutional functions in relation to which the Governor-General is entitled, according to convention, to act otherwise than on ministerial advice), which allow the Governor-General to act as a 'constitutional umpire'; and
- the ceremonial and representative functions which at present appear to occupy about 80 per cent of the Governor-General's time.

The Constitution provides that some functions are performed by the 'Governor-General in Council'. This refers to the Governor-General acting with the advice of the Executive Council. (All Ministers and Parliamentary Secretaries are members of the Executive Council, as are Ministers of former governments, although only those currently serving in the Ministry are under summons to attend meetings.)

Other constitutional powers, such as assenting to legislation and exercising the executive power of the Commonwealth, do not require the advice of the Executive Council. However, this distinction is largely formal: these powers are, by convention, only exercised on the advice of responsible Ministers.

Of the powers conferred on the Governor-General by the Constitution, only a few are considered 'reserve powers', that is, powers exercisable in some circumstances on the Governor-General's own discretion, without, or contrary to the advice of Ministers.

These are:

- the power to appoint the Prime Minister;
- the power to dismiss the Prime Minister, and therefore the Government; and
- the power to refuse to follow advice to dissolve the House of Representatives, or both Houses.

The situations in which it is regarded as acceptable for the Governor-General to exercise these powers are governed by the unwritten constitutional conventions.

DOES AUSTRALIA NEED A HEAD OF STATE?

Against this background, the Committee has considered whether Australia really needs a head of state. To a certain extent, the answer to this question will depend on the value which is given to each of the functions carried out by the Governor-General described above. The issues to be considered are:

- whether it is considered necessary that these functions continue to be performed;
- if so, whether it is necessary or desirable that they continue to be carried out by the occupant of a separate office established for that purpose; or
- whether they could be carried out by someone else, or in some other manner.

It is argued by some that there is no need to incur the expense (about $11 million a year) of a ceremonial head of state: the community role could be performed by other public officials, such as the Speaker of the House of Representatives or the President of the Senate; and the ordinary governmental role could be performed by those persons responsible for giving the advice in accordance with which the Governor-General presently must act. Finally, it is argued that the reserve powers could be done away with by establishing rules in the Constitution itself which would make unnecessary the intervention of a 'constitutional umpire'.

The cost of the office is something which can be dealt with outside of the Constitution. Parliament can provide for as lavish, or as spartan, a life-style for the Governor-General (or a republican head of state) as it wishes.

While dispensing with the office of head of state is an option which some Australians may think is worthy of serious consideration, it must be acknowledged that this would be a major departure from our existing system of government. The Committee is not aware of any nation (as opposed to provinces or states within nations) which does not have a head of state and, while the Prime Minister is unquestionably seen as a leader of the nation, there is much to be said for a national figure who stands above the hurly-burly of partisan politics and who can represent the nation as a whole, both to Australians and to the rest of the world.

A NEW OFFICE OF HEAD OF STATE

If a new office of head of state is to be established and our current principles of government are to be retained, the functions to be carried out are likely to be similar to those of the Governor-General. Because the new head of state would not be just a representative of the Queen, but Australia's head of state in his or her own right, he or she would occupy a more important and prominent role in Australian life than the Governor-General, even though the duties would remain almost entirely ceremonial. Moreover, the creation of an Australian office of head of state would provide an opportunity to consider the manner in which the functions of the office are to be carried out and to determine what is appropriate for Australia, including the introduction of certainty as to the extent of those functions.

What should the head of state be called?

The office of the head of state in republics around the world is almost invariably titled 'President', but there are other practical and acceptable options which would be consistent with republican status. While many were suggested to the Committee, the two most popular after 'President' were 'Governor-General' and 'Head of State'. Each of these three titles has advantages and disadvantages which are canvassed in the Committee's Report. The Committee is confident, however, that the name selected would soon become accepted.

What qualifications should the head of state have?

It is probably fair to assume that there is some unanimity among Australians about the qualities a

head of state should possess: that the person be an eminent Australian who is widely respected and regarded as able to behave in a politically impartial manner. While a person who lacks these qualities would be very unlikely to be chosen, the question arises what (if any) specific qualifications should be set out in the Constitution.

Possible qualifications include a minimum age, residency in Australia for a certain period, Australian citizenship, and those qualifications such as those currently applying to members of the Commonwealth Parliament. The Committee also considered the often suggested option of excluding former politicians from holding the office (whether for all time or for a limited time after leaving Parliament).

What kinds of qualifications are appropriate depends to some extent on the nature of the office and the method by which the head of state is to be appointed. Given the degree of scrutiny likely to be involved in the selection of the head of state, the Committee is inclined to the view that specific qualifications are not necessary beyond the fundamental ones that the person be an adult Australian citizen and not hold another remunerated position while in office.

How long should the term of office be?

The term should be specified, but there are a number of options in regard to its length - any period from four to seven years would seem reasonable. A term of five years would continue the practice established for Governors-General.

Re-appointment could be excluded altogether, allowed but only once (including for a shorter period of, say, three years), or allowed without restriction. Unlimited reappointment might not be appropriate in a republic with our system of government.

Who should perform the functions of the head of state in his or her absence?

The Committee considered the following options:

- keep the system as at present, with the senior, available State Governor being used;
- use another office holder such as the Speaker of the House of Representatives or the Chief Justice of the High Court; or
- create a separate office of 'Deputy Head of State'.

If the head of state is to have functions similar to the Governor-General, and to exercise much the same kind of powers, the first may be considered the most practical option.

HOW SHOULD THE HEAD OF STATE BE APPOINTED

At the moment, the Governor-General is chosen by the Prime Minister and appointed by the Queen on the Prime Minister's advice. The Governor-General can be removed by the same process - that is, by the Queen acting on the recommendation of the Prime Minister. Many different methods by which a head of state might be elected were suggested to the Committee, both in written submissions and at public meetings. The overriding theme to emerge was that the office of the head of state should be 'above politics' and the person holding the position should be seen as a 'non-partisan' figure, commanding a wide degree of popular support, and support from all sides of politics.

Appointment by the Prime Minister

Leaving the appointment of the head of state to the Government of day is the option which most closely reflects the current practice. Although Prime Ministers would no doubt continue to appoint appropriately qualified individuals and those appointees would similarly carry out the functions of the office in an even-handed fashion, the process of appointment may be viewed as a partisan one if left to the Prime Minister alone.

Appointment by Parliament

Involving the people in the appointment process through their parliamentary representatives is a democratic process and, depending on the particular method selected, can ensure that the person selected has the support of all major parties. Moreover, it would, through the Senate, reflect the federal nature of the Commonwealth.

There are a number of issues to be resolved. These include:

- whether the Houses should vote separately, thereby risking deadlock, or whether the members should vote in a joint sitting;
- whether the vote should require a simple majority of members or whether a 'special majority' should be required to ensure that the person selected would have not only the support of the Government members, but also of a substantial number of non-Government members; and
- whether a single nomination by the Prime Minister or a bipartisan nominating panel should be considered, or a number of nominations from other sources.

A joint sitting of the Houses would be in keeping with the importance of the occasion and could provide a symbol of unity appropriate for the appointment of a head of state who would represent the nation as a whole.

Requiring only a simple majority in each House, or indeed of members of both Houses in a joint sitting could, depending on the relative size of the Government's majority in the House of Representatives and its representation in the Senate, see the Government determine the outcome without the support of any other party, or with the support of only a small number of non-Government Senators.

Adopting a voting procedure which would necessarily require the support of members of more than one political party (e.g. a two-thirds majority) would discourage the nomination of individuals who were not likely to gain that support and would encourage prior consultation between parties on nominees.

A single nomination by the Government would have the advantage of avoiding parliamentary discussion on the relative merits of the candidates which could be seen as divisive and detrimental to the office. Moreover, if a two-thirds majority were required, prior consultation with other parties could be expected. An alternative to a Government nomination would be nomination by an independent commission or group of eminent people with membership on an ex officio basis (such as the Chief Justice of the High Court, the Prime Minister and the Leader of the Opposition) or made up of Australians outside the political process.

If having only a single nomination was considered too restrictive, multiple nominations could be allowed, possibly by a specified number of members of Parliament or by a nominating commission. A two-thirds majority requirement would ensure a bipartisan result in the end.

Popular election

The head of state could be elected by the people in a direct election. The argument in favour of such a method is that it is entirely democratic and would give Australians a direct voice in the process.

Another argument made to the Committee is that a direct election would prevent a political appointment, as could occur if the matter was left to politicians. This may not turn out to be the case in practice - indeed a direct election could ensure that the person elected is the nominee of one or other of the major political parties which have the expertise and resources to mount nation-wide political campaigns. A popular election might ensure that the head of state is not a 'political' appointment, but it may well result in the person elected being a 'politician'.

The Committee considered two options which might reduce the partisan nature of a popular election - a ban on political parties endorsing candidates for the head of state and excluding former politicians. It is doubtful whether such provisions would be effective in freeing the election from political campaigning and they may be seen as unduly restricting political freedoms.

The Committee considered that, while the option of popular election of the head of state is one which appears to have significant public support, it should be recognised that it would be expensive (particularly if held separately from a parliamentary election), would almost certainly involve political parties in the endorsement of candidates, and by its nature could discourage suitable candidates from standing. Moreover, the process of popular election may encourage the head of state to believe that he or she has a popular mandate to exercise the powers of that office, including the ability to make public statements and speeches, in a manner which could bring the head of state into conflict with the elected Government.

The Committee is therefore of the view that if popular election is chosen as the method of selecting the head of state, then, if the effect of our current conventions and principles of government is to be maintained, the Constitution should be amended so as clearly to define and delimit the powers of the head of state so that the Australian people know precisely the powers and duties of the head of state they are being called upon to elect.

Appointment by an electoral college

Several federal nations with non-executive heads of state establish electoral colleges to appoint their heads of state. Typically, the electoral college is made up of representatives from the national and State Parliaments. The case for including representatives of the States and Territories in the process for selecting the Commonwealth head of state this way is not, in the view of the Committee, a compelling one.

It would be possible to design a special body with representatives drawn from outside the Commonwealth, State and Territory Parliaments with the task of electing the head of state. Reaching a consensus in the community as to which groups or individuals should participate in such an electoral college would, to say the least, not be a straightforward task.

Summary

In summary, the main options as reflected in the submissions received by the Committee appear to be those involving selection either by a special majority of Parliament or by popular election. Both of these would represent a diminution of the present power of the Prime Minister to select

the Governor-General, and an increase in the power of the electors or their representatives to determine the outcome. If the head of state is to be popularly elected however, careful thought would have to be given to the issue of the powers of the head of state in order to ensure that he or she could not become a political rival to the elected Government.

REMOVAL OF THE HEAD OF STATE

Even though it is unlikely to happen, it is possible that the head of state may become mentally or physically incapacitated, commit a criminal offence or behave in a way which otherwise brings the office into disrepute. If the occupant was not inclined or able to resign, some method should be available to remove the person from office. In determining what the procedure should be there are two main issues to take into account. These are:

- whether the method of removal should reflect the method of appointment; and
- whether it should be necessary to establish specific grounds before the head of state could be dismissed.

The Committee considered that, unless there were practical reasons for not doing so, the method of removal should reflect the method of appointment. The Committee felt that there would be a case for not specifying grounds where the method of removal required an expression of a general dissatisfaction with the head of state, such as a two-thirds vote in the Parliament.

Removal in the case of a head of state appointed by the Prime Minister

The Government alone could have the power to remove the head of state, as is in practice the case with the Governor-General (although the Queen formally exercises the power). This might be considered appropriate only where the head of state is appointed by the Government. Even then it could be seen as jeopardising the impartiality and independence of the office. This, however, is not generally regarded as a disadvantage of the current system. Another option would be to have an independent tribunal establish the grounds for removal before the Government takes action.

Removal in the case of a head of state appointed by Parliament

The most practical option for removing a head of state appointed by Parliament is removal by the same means. As with appointment, there are a number of points to consider, including the majority required for removal; whether the Houses should consider the issue separately (and if so what should their respective roles be) whether the Constitution should provide for a tribunal to assist Parliament; and how the removal process should be initiated. There are particular advantages in having a joint sitting for the purpose of removing the head of state, both to avoid a deadlock and undesirable delay.

Requiring a majority which virtually guaranteed that removal could only occur if support were forthcoming from non-government members (two-thirds or even three-quarters if that were the majority necessary for appointment) would be in keeping with the principle that the office of head of state be kept free of partisan political considerations to the greatest extent possible.

As to the grounds of removal, there is a strong argument that, if two-thirds of the members of Parliament in a joint sitting resolve that the head of state should cease to hold office, that expression of dissatisfaction should be cause in itself for the head of state to be removed without

proof of any particular misbehaviour or incapacity.

Removal of a popularly elected head of state

While there is an argument that the electorate should have a say in the removal of a head of state who has been popularly elected, the Committee considers that there are a number of practical reasons why it may not be appropriate. Consideration of sensitive issues such as a person's mental or physical state, or whether he or she behaved in a way that demonstrates unfitness to hold office, is not readily susceptible to a drawn out and expensive referendum process. It would also be cumbersome in circumstances where the head of state is incapacitated, but by reason of that incapacity, is unable to resign.

The Committee believes that removal by a special majority (e.g. two-thirds majority) on the basis of demonstrated unfitness may be one way of providing the necessary degree of protection where a head of state is elected through an expression of popular will.

Removal in the case of a head of state elected by an electoral college

Removal of a head of state by an electoral college by that same process appears to be the logical option but, if the practical problems associated with reconvening such a specially constituted body are judged to be substantial, removal by the Commonwealth Parliament, upon proof of unfitness for office, could be considered.

POWERS OF THE HEAD OF STATE

Clearly the expression 'maintaining the effect of our current conventions and principles of government' in the Terms of Reference means that the head of State would not exercise day-to-day political power. The Committee considers that there are no strong reasons why a new head of state should not continue to exercise the same kind of 'governmental' functions on the advice of the Government of the day as are presently exercised by the Governor-General. In order to eliminate any uncertainty however, the Constitution should provide that in the exercise of these powers the head of state acts on ministerial advice.

The Committee also notes that to eliminate the 'reserve powers' might be regarded as a substantial change in our way of government. This leaves for consideration therefore, the issue of how the reserve powers (and the unwritten constitutional conventions which govern the exercise of those powers) should be dealt with in the Constitution so as to maintain the effect of the existing conventions and principles.

The options considered by the Committee are:

- leaving the powers of the head of state in the same form as are presently set out in the Constitution, but stating in the Constitution that the existing constitutional conventions will continue to apply to the exercise of those powers;

- leaving the powers of the head of state in the same form as are presently set out in the Constitution and formulating the relevant constitutional conventions in an authoritative written form, but not as part of the Constitution;

- leaving the powers of the head of state in the same form as are presently set out in the

Constitution and providing that Parliament can make laws (possibly by a two-thirds majority) to formulate the relevant constitutional conventions in a legislative form; and

- 'codifying' the relevant conventions by setting out in the Constitution the circumstances in which the head of state can exercise the reserve powers.

This last option can be done in one of two ways:

- by setting out the most important conventions about which there is general agreement (such as that the head of state appoints as Prime Minister the person the head of state believes can form a government with the support of the House of Representatives), and providing that the remaining (unwritten) conventions are otherwise to continue (i.e. partial codification); or

- by setting out in the Constitution all the circumstances in which the head of state can exercise a reserve power and stating expressly that in all other circumstances the head of state is to act on the advice of the Prime Minister, the Federal Executive Council or some other Minister (i.e. full codification).

The Committee has formulated some draft provisions which illustrate these approaches. These are located in Chapter 6 of the Report.

The Committee has considered the possibility of leaving the provisions conferring powers on the head of state in their present very broad terms, saying nothing about the constitutional conventions and simply assuming that they will continue to apply. The Committee does not regard this as a viable option. Such an approach would lead many people to fear (perhaps justifiably) that the conventions, which grew up around monarchical powers, would not apply in a republic and that as a result, the new head of state would have potentially autocratic powers.

Some provision should therefore be made in the Constitution in relation to the exercise of the head of state's powers. Whether that provision is to be an express incorporation of the existing conventions (without defining them), or some form of codification of those rules which currently depend on convention, it is clearly possible to define the powers of a new head of state in a way that preserves the essential elements of Australian democracy and maintains the present balance between the Government and the head of state.

The Senate, supply and the reserve powers

Any attempt to codify the reserve powers of an Australian head of state must deal, in one way or another, with the question of the Senate and supply. The Committee considered the following approaches to the question of what the head of state should do if faced with a similar situation as occurred in 1975 (when the Senate deferred consideration of the Bills providing money necessary for the Government to carry on governing and the Governor-General dismissed the Prime Minister):

- continue the existing conventions which, while not providing a clear answer to that question (because views differ about the relevant conventions), merely preserves the uncertainty of the current situation;

- rely on a codification provision which allows the head of state to dissolve the House of

Representatives if the Government is breaching the Constitution (as it would be if it spent money that had not been appropriated by Parliament), and also dismiss the Prime Minister (and therefore the Government) if the Government persists in the contravention;

- provide in the Constitution for an automatic double dissolution in such circumstances; or
- remove the Senate's power to reject or delay these kinds of bills.

It should be noted that at least the last two of these approaches may be regarded as a substantive change to our present way of government. The removal of the uncertainties would involve resolving a more fundamental question about the relative powers of the House of Representatives and the Senate.

HOW DOES THE CONSTITUTION HAVE TO BE AMENDED FOR AUSTRALIA TO BECOME A REPUBLIC?

It is necessary to amend the Constitution (which, of course, requires the agreement of the people in a referendum) in order to establish a republic in Australia. Changes to the Constitution for this purpose would involve provisions:

- terminating the Queen's role as head of state and establishing a new office of head of state if it is decided to create one;
- dealing with appointment and removal of the new head of state and other matters relevant to the new office;
- dealing with the powers of the new head of state;
- dealing with the position of the States and their links with the Crown; and
- making consequential changes, mostly removing the references to the Queen and replacing the references to the Governor-General with references to the new head of state, and inserting transitional provisions.

The important legal issues considered by the Committee in this regard are as follows:

- whether the method of amending the Constitution provided in section 128 (i.e. a popular referendum requiring approval of a majority of voters nationally and also a majority of voters in four of the six States) can be used to make the necessary changes;
- whether the Commonwealth of Australia Constitution Act 1990 (the Act of the British Parliament of which our Constitution is a part) needs to be amended in order to create a republic; and
- whether that Act be amended through the referendum process.

The Committee is satisfied, based on advice provided by the Acting Commonwealth Solicitor-General, that section 128 gives the Australian people through a referendum sufficient power to establish a republic. Amendment of the British Act, though not strictly necessary, is legally possible by Australians in Australia and, since that Act contains several references to the British Crown, it may be appropriate to amend it as part of a change to a republican Commonwealth of Australia.

WHAT ARE THE IMPLICATIONS FOR THE STATES?

None of the options referred to above would change the relationship between the Commonwealth and the States. However, there are implications for the States in a move to a republic as the Queen is head of state in the States as well as the Commonwealth of Australia.

There are different views of what might be the legal effect on the States if Australians decided in a referendum to become a republic. Some commentators argue that the Crown's links with the Commonwealth and the States are independent (or even that there are seven separate Crowns) and therefore that removal of the Crown at the Commonwealth level need not affect the States. However, there is an alternative view that there is only one Crown of Australia and its removal at the Commonwealth level, without any special provision for the States, would in effect abolish the Crown at the State level as well.

The Committee accepts the conclusion of the Acting Solicitor-General that, in order to minimise legal debate on these matters, it would be sensible for amendments creating a republic to deal specifically with the position of the States. Just how the Constitution should deal with the States would depend on whether any of the States wished to retain the person who is monarch of the United Kingdom as its head of state, notwithstanding the approval of the change at a nation level in the referendum, and whether that prospect was considered acceptable.

If all of the States decided to conform with a national decision in favour of a republic, the Constitution could be amended so as to prevent the States from recognising a monarch as their head of state. This approach would leave the States to amend their own constitutions, but the amendments could be framed so as to override some of the provisions which currently require special majorities or State referenda for this to be done. The States would need to make provision in their constitutions for the functions previously carried out by the Governor as the monarch's representative. There would also be a need to amend the Australia Act 1986 to resolve any doubts as to whether it entrenches the monarchy at State level.

The Committee has concluded that, however anomalous it might appear, particularly after a referendum in which the majority of Australians in a majority of States expressed the desire for Australia to become a republic, it would be legally possible for the Constitution to allow a State to remain a monarchy within a federal republic (assuming that the Queen agreed to such an arrangement). In the event that a State decided to retain the monarchy, the committee has concluded that:

- States could be left free to choose their own course (in which case, to avoid legal doubt, it would be advisable to insert some specific provision in the Constitution - e.g. providing for the monarch to remain as head of state in each State but with a mechanism for a State to abandon the monarchy should it decide to do so); and
- if the prospect of States retaining links with the monarchy was considered unacceptable, the amendments described above (abolishing the monarchy at State level) could be made without the cooperation of all States. (In order to prevent a governmental vacuum in a State, it would be necessary to include transitional provisions in the Commonwealth Constitution applying to that State, for instance providing for the incumbent Governor to remain in office).

OTHER ISSUES RELEVANT TO AUSTRALIA BECOMING A REPUBLIC

Among the other issues considered by the Committee were the following:

- whether a change to a republic necessarily involves a change to the name 'Commonwealth of Australia' - the Committee concluded that it does not, and that there does not appear to be a strong case for such a change;

- whether a change to the preamble to the Commonwealth of Australia Constitution Act 1990 would be necessary or desirable if Australia were to become a republic - the Committee concluded that it is not necessary, as a matter of law, to change the preamble, but that the change to a republic might be an appropriate time to reassess the statements about Australia which are contained in the preamble;

- whether the specific references in the text of the Constitution to the Queen and the Governor-General would have to be removed - the Committee concluded that generally they would;

- what should be done in relation to the 'royal prerogatives' - the Committee concluded that it would be necessary to preserve the powers and rights of Commonwealth and State governments which are presently derived from the common law prerogatives of the Crown and that, based on the advice of the Acting Solicitor-General, this could be achieved by including a provision to that effect in the Constitution; and

- what other aspects of the law and our legal system would need to be modified as a result of a change to a republic - the Committee concluded that consideration would have to be given to changes in the following areas (amongst others):

    - laws and practices relating to royal charters, the use of 'royal' titles etc;

    - a replacement mechanism for filling offices presently filled by commissions from the Crown (such as Defence Force officers and the police); and

    - transitional and consequential provisions to replace references in legislation to the Governor-General (Governor), Crown etc, at the Commonwealth and State level.

The Committee also concluded that a change to a republic need not have any implications for Australia's membership of the Commonwealth of Nations, more than half the members of which are already republics.

AN AUSTRALIAN REPUBLIC - CONCLUSION

The view is often expressed that Australians generally do not know enough about the Australian Constitution, its history and our system of government. The Committee would like to think that its work and the surrounding debate has contributed to a higher level of understanding of, and interest in constitutional issues. Nonetheless, much more needs to be done. The Committee found a common view among the community and its leaders, regardless of particular views held

on the republican debate, that Australians should have more opportunity to understand the basic principles of Australian government. The Committee believes that those entrusted with primary and secondary education in particular, should consider the introduction or extension of appropriate courses in the fields of civics and government.

The debate about the republic has awakened interest in many other proposals for constitutional change, such as changes to the role of the States and the powers of the Senate. No doubt the increased public understanding arising from the current republican debate will allow these issues to be considered on a more informed basis. The Committee believes that this is a very healthy trend. Those who demand that the Constitution be defended as though it were holy writ often overlook that most important clause of the Constitution, section 128, which permits the Constitution to be amended by a vote of the Australian people. Nonetheless, the issue of whether Australia should have an Australian head of state is a discrete one, both logically and legally, and deserves consideration on its own merits.

The primary question for Australians to consider in the course of the republic debate is whether Australia should have an Australian citizen chosen by Australians as its head of state, or whether it should retain as its head of state the person who is monarch of the United Kingdom. This is an issue on which views of Australians differ and on which the debate is likely to continue. It is not one which this Committee has been asked to consider, and the Report does not do so.

The Committee has instead addressed a question which is probably just as important - 'What might be involved in a change to a republic in Australia?'. Many have argued that it is only when that question is answered that they will be in a position to make an informed judgment about whether a republican Australia is what they want.

This overview and the full Report will, the Committee hopes, assist in clarifying the issues associated with a change to a republic. The major issues are few - how should the head of state be appointed (and removed if necessary), what sort of powers and functions should the head of state have; what will be the effect of the Queen's role in the States if Australia were to become a republic; and finally, what changes to the Constitution need to be made to achieve this outcome. That is not to say that those issues will not require careful consideration and may not raise complex legal questions. The Committee's Report summarised in this overview demonstrates, however, that there are a number of practical and workable options for addressing these issues, and that the legal complexities are readily soluble.

Concerns have been voiced about the effect that a move to a republic may have on our existing system of parliamentary government. The Report demonstrates that the options addressed will enable a republic to be achieved without making changes which in any way detract from the fundamental constitutional principles on which our system of government is based - federalism, responsible parliamentary government and the separation of powers, and judicial review of legislation and government action. As a Justice of the High Court has remarked:

To my mind, the final formal end to the role of the monarchy in Australia, if it occurs, need not mean a fundamental change in our constitutional structure or, at least, a fundamental change in the sense in which I am speaking, for I am speaking of the machinery of government and not the history of sentiment. If it were thought desirable to substitute the Governor-General, elected or appointed, as the head of state it would, I think, be possible to achieve that in a manner which would involve little disruption to the present constitutional set-up and may even serve to eliminate some of the difficulties which still remain in discerning the role of the Crown in our federation.

If Australians through the referendum process do decide that they wish to have an Australian citizen as head of state, our existing system of government will be affected only to the extent that Australians desire it.

Those who are anxious that a republic would result in an enhancement of the authority of the Prime Minister will have noted that most of the options canvassed in the report will actually enhance the standing of the head of state. For instance, an Australian head of state appointed (and removable) by a two-thirds majority of a joint sitting of Parliament could be seen as more independent than a Governor-General who holds office in effect at the pleasure of the Prime Minister.

Others have expressed fears that a new head of state could be freed from the conventions which limit the exercise of vice-regal powers and could therefore have too much power. The Report outlines several methods by which the effect of those conventions could be applied to a new head of state, and perhaps also clarified.

As to the argument that a move to a republic would impinge on the rights and autonomy of the States, the Report demonstrates that no change to Commonwealth - State relations would necessarily arise from such a move. It is even possible for a State to retain the Queen (assuming she were to agree) as its head of state.

This is not to say that a move to a republic is other than an important constitutional change which requires careful consideration. But fears that it must involve substantial and unwelcome change to our political system are not well founded. The establishment of an Australian republic is essentially a symbolic change, with the main arguments, both for and against, turning on questions of national identity rather than questions of substantive change to our political system.

The republic debate will doubtless continue to involve a fair degree of rhetoric from all sides. But in the midst of that rhetoric, and occasional hyperbole, the Committee hopes there will be enough room for a sober discussion of the more practical issues of constitutional law and practice discussed in the Report. That discussion will be enhanced considerably if a genuine effort is made to inform Australians, particularly young Australians, about their Constitution, its history and their system of government generally. If, as time goes on, the debate becomes more informed, the quality of our democracy will be improved regardless of whether a republic is established. All those who participate in that debate owe a responsibility to their fellow citizens to ensure that the debate is one which appeals at least as much to reason as it does to emotions.

Source: Year Book Australia,1995 (ABS Catalogue No. 1301.0)

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